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No. 01-1522

In The
Supreme Court of the United States

NICK FURFARO; BRANDY KIDDER;
ESMERALDA SILVA; and JJR, INC.,

Conditional Cross-Petitioners,

v.

CITY OF SEATTLE,

Conditional Cross-Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of Washington

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTION

The City's briefing to this Court makes it plain that it believes that its police officers have the right – without obtaining a warrant or even considering the issue of obscenity – to arrest any performer in an adult entertainment establishment who touches her buttocks, breast or other private area while dancing on stage. Br. in Opp. at 1-3, 16. This radical proposition is at loggerheads with this Court's free expression jurisprudence, and finds no support in this Court's prior restraint or Fourth Amendment cases. While nude dancing may fall only within the "outer ambit of the First Amendment's protection," *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion), it is nonetheless protected. Therefore, under the First Amendment as well as Seattle's own ordinance, police officers may arrest adult entertainers for the content of their dances only if they have probable cause to believe that their performances constitute obscene expression. And no decision from this Court or any other court has ever held that nude dancing that includes some self-touching in the course of conveying a sensual message (as it almost always does) automatically becomes obscene conduct. (Indeed, in prior state court proceedings, the jury decided that one of the entertainers arrested in this very case was not guilty of obscenity. App. to City's Pet. for Cert. at 29.) The City's misunderstanding of this basic point demonstrates not only why this Court should deny the City's petition for certiorari, but it also shows why this Court should review the City's warrantless arrest policy at the first appropriate opportunity.

Cross-Petitioners submit this Reply Brief to refute two points in the City's brief in opposition to the Conditional Cross-Petition. First, the Washington Supreme Court's

holding that the warrant requirement that applies to sexually explicit books and film does not also apply to sexually explicit live entertainment is, contrary to the City's arguments, inconsistent with this Court's precedent. Second, the City is simply wrong in asserting that the question whether the Constitution permits after-the-fact probable cause determinations concerning arrests of live entertainers is not properly before this Court.

II. ARGUMENT

A. The Washington Supreme Court's Refusal to Require a Warrant Here is Inconsistent with this Court's Precedent.

While not disputing that division of authority exists on this question, the City urges this Court to deny certiorari on the ground that the Washington Supreme Court's refusal to require officers to obtain warrants before arresting nude dancers for obscene expression is consistent with this Court's precedent.[1] Specifically, the City contends that its warrantless arrest policy is constitutional because when adult entertainers touch their buttocks or breasts

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[1] The City does claim that two of the cases implicated in this split are inapplicable because they "involved an arrest for selling or promoting allegedly-obscene printed materials or films." Br. in Opp. at 10. But the City does not provide any reason for thinking that promoting allegedly obscene books and films is any different from promoting allegedly obscene live entertainment. Nor does any such reason exist. What makes those cases and this one incrementally different from *Marcus v. Search Warrant*, 367 U.S. 717 (1961), and *Roaden v. Kentucky*, 413 U.S. 496 (1973), is that the former cases involve arrests of individuals, while the latter involve seizures of inanimate objects. Thus, all of the cases Cross-Petitioners cite in their Conditional Cross-Petition contribute to the split of authority on this issue.

during a stage performance, they engage in "action" or "conduct" that somehow is not entitled to ordinary First Amendment protections. Br. in Opp. at 1, 5, 14. The City further maintains that any prior restraint concerns raised by this policy dissipate because "nude dancing is not afforded the same First Amendment protections as books and films." Br. in Opp. at 1.

The City's arguments are incorrect and, indeed, emphasize that if this Court grants the City's petition for certiorari, a review of this warrant issue is essential as well. The City's position that its officers' conduct here was justified by the dancers' "conduct" is apparently based on its assumption that nude dancing automatically loses First Amendment protection whenever a performer touches her own buttocks or breast. But no court has ever so held, for such a rule would vitiate this Court's doctrine that expressive conduct, including dancing, is unprotected by the First Amendment only if its content *"taken as a whole"* appeals to the prurient interest and is so patently offensive and otherwise lacking in value that it is obscene. *Miller v. California,* 413 U.S. 15, 23 (1973) (emphasis added); *see also City of Erie v. Pap's A.M.,* 529 U.S. 277, 289 (2000) (plurality opinion). Indeed, if identifying obscenity were as easy as identifying an exposed or touched body part in a performance or a picture, then the First Amendment's procedural protections based on the "dim and uncertain line" that separates obscene from protected expression would make no sense. *See, e.g., Bantam Books v. Sullivan,* 372 U.S. 58, 66 (1963). The City's one-size-fits-all approach to identifying obscenity completely undermines this Court's carefully crafted protection of sexually oriented expression.

Because determining whether *any form* of sexually oriented expression is obscene is a sensitive and multi-faceted task, it is clear that the arrests here were just like the seizures at issue in *Marcus v. Search Warrant,* 367 U.S. 717 (1961), and *Roaden v. Kentucky,* 413 U.S. 496 (1973), in the sense that the police officers seized persons/items based on the unreviewed conclusion that their content was so sexually explicit that they were not protected expression. The only distinction between this case and the *Marcus/Roaden* line of cases is that this case involves live entertainment instead of books and films. The key question thus is whether that distinction makes any constitutional difference regarding the need for a pre-seizure warrant.

The City's assertion, echoing the Washington Supreme Court, that "nude dancing is not afforded the same First Amendment protections as books and films," Br. in Opp. at 1, does not answer this question, for it rests on a false comparison. The proper comparison between this case and the *Marcus/Roaden* line of cases is between live entertainment and books and films – or between nude dancing and books and films (found in adult bookstores and theatres) depicting nudity. Either way, the result is the same. This Court explicitly held in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557-58 (1975), that live entertainment is entitled to the same prior restraint protections as books and film, and every lower court to consider the issue has held that nude dancing is entitled to the same First Amendment protections as sexually explicit books and film. *See, e.g., Dima Corp. v. Town of Hallie,* 185 F.3d 823, 827 (7th Cir. 1999). Similarly, this Court has consistently held that individuals are entitled to as much Fourth Amendment protection against warrantless arrests

as inanimate objects are warrantless against seizures. *See, e.g., Steagald v. United States,* 451 U.S. 204, 213 (1981); *Payton v. New York,* 445 U.S. 573 (1980). Thus, as the dissent below and numerous other courts have recognized, once a proper comparison is made between the seizures at issue here and those at issue in *Marcus* and *Roaden*, it becomes plain that there is no basis for requiring a warrant in one context but not the other. *See* Cross-Pet. at 13-15 (citing cases).

B. Cross-Petitioners' Second Question Presented is Properly Before this Court.

Instead of commenting on the certworthiness of Cross-Petitioners' second question presented (whether arrests of live entertainers can be validated by purely after-the-fact determinations of probable cause), the City argues only that Cross-Petitioners are precluded from raising this argument because they did not raise it below. The City, however, is incorrect as a matter of fact and, in any event, fundamentally misunderstands this Court's rules regarding waiver.

Cross-Petitioners *did* argue below that probable cause was lacking in this case under the First and Fourth Amendments. As the Washington Supreme Court stated, "the [Washington] Court of Appeals *agreed with Respondents that a consideration of obscenity is essential to the determination of probable cause to arrest* under SMC 6.270.100(A)(2)." App. to City's Pet. for Cert. at 14 (emphasis added); *see also id.* at 22 (confirming that Cross-Petitioners raised same argument in Washington Supreme Court). Furthermore, the notion that police officers themselves must at least actually consider obscenity before

making arrests under SMC 6.270.100 is subsumed within Cross-Petitioners' broader argument that such arrests violate the First and Fourth Amendments unless they are done pursuant to a warrant from a neutral magistrate finding that the expression at issue is obscene.

But even if Cross-Petitioners somehow had failed adequately to brief the particular issue whether – in the event that a court held that a neutral magistrate is not required to make a pre-arrest determination regarding obscenity – a police officer must at least do so, it still would not matter in the slightest. It is a basic rule of this Court that "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio,* 360 U.S. 423, 436-37 (1959). It is enough for this Court's purposes if the state's highest court "reached and decided" the issue. *Jenkins v. Georgia,* 418 U.S. 153, 157 (1974); *accord Orr v. Orr,* 440 U.S. 268, 274-75 (1979); *Charleston Federal Savings & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-86 (1945); *Whitney v. California,* 274 U.S. 357, 360-61 (1927); Stern & Gressman et al., Supreme Court Practice §3.18 (7th ed. 1993) ("Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the [United States] Supreme Court's concern with the proper raising of the federal question in the state courts disappears."). In short, this Court "need not inquire how and when" the federal question "was raised [in state court] when such question appears to have been actually considered and decided by that court." *Alderson,* 324 U.S. at 185-86.

There can be no dispute that the Washington Supreme Court extensively considered and decided this second question presented – namely, whether the First and

Fourth Amendments permit police officers' arrests of nude dancers for allegedly obscene conduct to be validated solely by post-arrest determinations of probable cause. App. to City's Pet. for Cert. at 19-22. The City does not contend otherwise. That being so, that question is properly before this Court.

III. CONCLUSION

For the foregoing reasons, if this Court grants the City's petition for certiorari in this case, it should also grant this Conditional Cross-Petition for Certiorari.

RESPECTFULLY SUBMITTED this 31st day of May, 2002.

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